



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1145

[Doc. No. AMS-DA-18-0097]

Reauthorization of Dairy Forward Pricing Program

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule reauthorizes the Dairy Forward Pricing Program (DFPP) in accordance with the Agriculture Improvement Act of 2018 (2018 Farm Bill). Establishing new contracts under the DFPP has been prohibited since the expiration of the program on September 30, 2018. The 2018 Farm Bill reauthorized the program to allow handlers to enter into new contracts until September 30, 2023. Any forward contract entered prior to the September 30, 2023, deadline is subject to a September 30, 2026, expiration date.

DATES: *Effective Date:* [Insert date one day after date of publication in FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Roger Cryan, Director, Economics Division, USDA/AMS/Dairy Programs, Stop 0229-Room 2753-S, 1400 Independence Avenue, SW, Washington, DC, 20250-0231; telephone: (202) 720-7091; or, e-mail: roger.cryan@usda.gov.

SUPPLEMENTARY INFORMATION: The Food, Conservation, and Energy Act of 2008 (2008 Farm Bill)¹ initially established the DFPP². The DFPP allows milk handlers, under the

¹ Public Law No. 110-234

² 73 FR 64868

Agricultural Marketing Agreement Act of 1937, (AMAA)³ to pay producers or cooperative associations of producers a negotiated price for producer milk, rather than the Federal order minimum blend price for non-fluid classes of milk (Classes II, III, and IV under the Federal Milk Marketing Order (FMMO) system). The DFPP does not allow for forward contracting of fluid or Class I milk.

Following the initial expiration of the DFPP which prevented the establishment of new contracts after September 30, 2012, the “American Taxpayer Relief Act of 2012,” (ATRA)⁴ revised the program to allow handlers to enter into new contracts until September 30, 2013. The “Agricultural Act of 2014” (2014 Farm Bill)⁵ then extended the program to allow new contracts until September 30, 2018. Establishing new contracts under the DFPP has been prohibited since the expiration of the program on September 30, 2018. Any forward contract established prior to the September 30, 2018, deadline is subject to a September 30, 2021, expiration date.

Participation in the DFPP is voluntary for dairy farmers, dairy farmer cooperatives, and handlers. Handlers may not require producer participation in a forward pricing program as a condition for accepting milk. USDA, including Market Administrator personnel, does not determine the terms of forward contracts or enforce negotiated prices. This regulation also does not affect contractual arrangements between a cooperative association and its members.

Under the DFPP, regulated handlers must still account to the FMMO pool for the classified use value of their milk. Regulated handlers claiming exemption from the Federal order minimum pricing provisions must submit to the Market Administrator a copy of each forward contract. The contract must contain a disclosure statement—either as part of the contract itself or

³ 7 U.S.C. 601-614

⁴ Public Law No. 112-240

⁵ Public Law No. 113-79

as a supplement—to ensure producers understand the nature of the program as well as the basis on which they will be paid for their milk. Contracts that do not contain a disclosure statement are deemed invalid and returned to the handler. For the first month the program is effective, contracts must be signed on or after the day the program becomes effective, and the contract must be received by the Market Administrator by the 15th day of that month. For example, if the program becomes effective on February 15, contracts for March milk must be signed between February 15 and February 28, and copies must be received by the Market Administrator by March 15.

Handlers with forward contracts remain subject to all other milk marketing order provisions. Payments specified under a forward contract must be made on or before the same date as the federal order payments they replace. Required payment dates are specified in §1145.2(e) of the regulations.

This final rule reauthorizes producers and cooperative associations of producers to enter into forward price contracts under the DFPP through September 30, 2023. All terms of the new forward contracts must expire prior to September 30, 2026. All other provisions and requirements of the program as provided for in the final rule⁶ published October 31, 2008, are still in effect. This document also provides notice that reauthorization of the DFPP applies to the milk regulated by the recently established California FMMO in addition to the other ten FMMOs.⁷

EXECUTIVE ORDERS 12866 and 13771

⁶ 73 FR 64868

⁷ See addition of 7 CFR 1051.73 in § 1145.2(a)

This rule has been determined to be not significant for purposes of Executive Order 12866, and therefore has not been reviewed by the Office of Management and Budget (OMB). In addition, because this rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in Executive Order 13771. *See* OMB's Memorandum titled "Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs'" (February 2, 2017).

EXECUTIVE ORDER 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have a retroactive effect. The adopted amendments do not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to judicial challenge to the provisions of this rule.

REGULATORY FLEXIBILITY ACT AND PAPERWORK REDUCTION ACT

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 - 612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities and has certified that this rule will not have a significant economic impact on a substantial number of small entities.

For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a small business if it has an annual gross revenue of less than \$750,000, and a dairy products manufacturer is a small business if it has fewer than 500 employees.

Based on AMS data, the milk of 33,481 dairy farmers was pooled on the Federal milk marketing order system. Of the total, 32,958 dairy farmers, or 98 percent, were considered small businesses. During the same month, 301 handler plants were regulated by or reported their milk receipts to be pooled and priced on a Federal milk marketing order. Of the total, approximately 163 handler plants, or 54 percent, were considered small businesses.

Producer and handlers use the DFPP as a risk management tool. Under the DFPP, producers and handlers can “lock-in” prices, thereby minimizing risks associated with price volatility that are particularly difficult for small businesses to mitigate. Therefore, reauthorization of this program will not have a significant economic impact on a substantial number of small entities.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Section 1601(c)(2)(B) of the 2014 Farm Bill provides that the administration of the DFPP shall be made without regard to the Paperwork Reduction Act (PRA), 44 U.S.C. Chapter 35. Section 1701 of the 2018 Farm Bill⁸ extends that Congressional direction to the current reauthorization of the DFPP. Thus, any information collection conducted for the DFPP is not subject to the PRA.

FINAL ACTION

In accordance with the 2018 Farm Bill, this final rule extends the DFPP to all Federal milk marketing orders. New contracts under the Program may be entered into until September

⁸ Public Law No. 115-334

30, 2023. Any forward contract entered into up to and until the September 30, 2023, deadline is subject to a September 30, 2026, expiration date.

Section 1601(c)(2)(A) of the 2014 Farm Bill provides that the promulgation of the regulations to implement the reauthorization of the DFPP shall be made without regard to the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. 553. Section 1701 of the 2018 Farm Bill extends that Congressional direction to the current reauthorization of the DFPP. AMS, therefore, is issuing this final rule without prior notice or public comment.

Additionally, this final rule will be effective on [Insert date one day after date of publication in FEDERAL REGISTER]. As explained above, the DFPP is a voluntary program and AMS will not take action until forward contracts are received from handlers who are choosing to participate in this program. By making this rule effective one day after publication in the Federal Register, handlers will have the maximum amount of time to begin the contracting process with producers. Thus, it is unnecessary and contrary to the public interest to delay the effective date of the final rule further.

List of Subjects in 7 CFR Part 1145

Contract, Forward contract, Forward pricing, Milk.

For the reasons set forth in the preamble, title 7, chapter X, part 1145, of the Code of Federal Regulations is amended as follows:

PART 1145 - DAIRY FORWARD PRICING PROGRAM

1. The authority citation for 7 CFR part 1145 continues to read as follows:

7 U.S.C. 8772.

2 . Amend § 1145.2 by revising paragraphs (a) and (b) to read as follows:

§ 1145.2 Program.

(a) Any handler defined in 7 CFR 1000.9 may enter into forward contracts with producers or cooperative associations of producers for the handler's eligible volume of milk. Milk under forward contract in compliance with the provisions of this part will be exempt from the minimum payment provisions that would apply to such milk pursuant to 7 CFR 1001.73, 1005.73, 1006.73, 1007.73, 1030.73, 1032.73, 1033.73, 1051.73, 1124.73, 1126.73 and 1131.73 for the period of time covered by the contract.

(b) No forward price contract may be entered into under the program after September 30, 2023, and no forward contract entered into under the program may extend beyond September 30, 2026.

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Dated: February 25, 2019.

Bruce Summers,
Administrator,
Agricultural Marketing Service.

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